

# **EXHIBIT 3**

## UNITED STATES COURT OF APPEALS

## FOR THE NINTH CIRCUIT

In re:

ANTHONY THOMAS; WENDI  
THOMAS; AT EMERALD, LLC;

Debtors.

ANTHONY THOMAS, WENDI  
THOMAS,

Appellants,

vs.

KENMARK VENTURES, LLC,

Appellee.

Bk Case No. BK-N-14-  
50333BTB

Chapter 7

[Lead Case – Jointly  
Administered]9<sup>th</sup> Cir. No. 17-60042**ERRATA TO APPELLANTS'  
MOTION TO SUPPLEMENT  
RECORD TO INCLUDE NEWLY  
AVAILABLE EVIDENCE**

Appellants Anthony Thomas and Wendi Thomas (“Appellants”), by and through their legal counsel, Macauley Law Group, P.C., respectfully files this Errata to their Motion To Supplement Record to Include Newly Available Evidence (“Motion”):

1. On February 12, 2018, Appellants filed their Motion with an Exhibit “A” that consisted of a Declaration of Robert A. Machado in support of Defendant Anthony Thomas’ C.C.P. §473(d) Motion to Set Aside and Vacate the Settlement

Entered Into on October 5, 2011 ("Machado Declaration"). The filed Machado Declaration was missing Page 4 of its contents.

Attached as Exhibit "A" to this Errata is the Machado Declaration with all of its pages, including Page 4.

Respectfully submitted,

DATED: February 12, 2018

MACAULEY LAW GROUP

a Professional Corporation

By: /s/ Laury M. Macauley  
LAURY M. MACAULEY, ESQ.  
*Attorneys for Appellants*  
*Anthony Thomas and Wendi Thomas*

### **DECLARATION**

I, Laury M. Macauley, Esq., hereby declare under penalty of perjury that I am counsel for Appellants, Anthony Thomas and Wendi Thomas, and that the foregoing facts are true and correct to the best of my knowledge and belief. Executed this 12<sup>th</sup> day of February, 2018, at Roseville, California.

/s/ Laury M. Macauley  
LAURY M. MACAULEY

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Bankruptcy Appellate Panel of the Ninth Circuit by using the appellate CM/ECF system for that Court on February 12, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system for this Court. I also certify that I have served a copy of this Motion via email on Appellee's Counsel.

/s/ Laury M. Macauley  
LAURY M. MACAULEY

# EXHIBIT A

# EXHIBIT A

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 Machado & Machado  
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 Facsimile: 408 280-7313

Attorney for  
 Anthony Thomas and AT Emerald LLC

SUPERIOR COURT FOR THE STATE OF CALIFORNIA  
 COUNTY OF SANTA CLARA

KENMARK VENTURES, LLC

Plaintiff,

vs.

ANTHONY THOMAS,

Defendant

Case No.: 1-08-CV-130677

DECLARATION OF ROBERT A.  
 MACHADO IN SUPPORT OF  
 DEFENDANT ANTHONY THOMAS'  
 C.C.P. §473(d) MOTION TO SET  
 ASIDE AND VACATE THE  
 SETTLEMENT ENTERED INTO ON  
 OCTOBER 5, 2011

Decl. of Robert A. Machado ISO Anthony Thomas' Motion To Set Aside

1 I, Robert A. Machado, declare as follows:

- 2 1. I was one of the attorneys of record in this case on October 5, 2011 when the parties  
3 settled this case and recited the settlement in open court.
- 4 2. In that action, I was co-counsel with Michael T. Morrissey ("Morrissey"), SBN 62195  
5 (now disbarred) representing our mutual client, Anthony Thomas.
- 6 3. On June 24, 2011, I associated in as co-counsel with Morrissey on this case pursuant to  
7 my prior arrangement with Morrissey to associate in as co-counsel with Morrissey in cases  
8 that may be affected by a six month suspension he needed to serve. You see back in 2009,  
9 in an attempt to accommodate Morrissey, his clients, opposing parties, their counsel and  
10 the courts, with the client's consent, I agreed to associate in as co-counsel in all of  
11 Morrissey's ongoing cases that may be affected by said suspension at no additional costs  
12 or fees to his clients. As a way of background, in the mid to late 2000's Morrissey  
13 participated in and successfully completed the State Bar Court's ADP for five consolidated  
14 proceedings pertaining to his conduct in 2002-2004 and was in fact congratulated and  
15 commended by the Bar for his dedication and exemplary conduct in completing said  
16 program. In spite of his commendable conduct the Bar Court was of the opinion that he  
17 still had to be subjected to the six month suspension, but allowed him to break it up into  
18 three 60 day terms in order to lessen the hardship Morrissey and his clients would sustain.  
19 At the time I associated in this case Morrissey had completed two of his three terms and  
20 was scheduled to start his last term of suspension on August 1, 2011. Note: His first two  
21 terms of suspensions were from 11-25-2009 thru 1-25-2010 (62 days) and 7-13-2010 thru  
22 9-13-2010 (63 days) for a totaled 125 days. Therefore Morrissey was of the opinion that  
23 he had 55 days left of his suspension and if he commenced his last term of suspension on  
24 8-1-2011 he would have served the remaining 55 days by September 24 and thus with the  
25 trial date being moved to October 3, 2011 he would be eligible to practice law and able to  
26 attend the mandatory settlement conference scheduled for September 28, 2011. Although  
27 his calculations as to the number of days was correct on the morning of September 28,  
28 2011 he was still listed as ineligible to practice law and therefore I alone represented

1 Anthony Thomas and AT Emerald LLC at the settlement conference. (By October 3 his  
2 status was changed to eligible to practice.)

3 4. At said conference I pointed out to Judge pro tem Chris Graham the attorney conducting  
4 the settlement conference that all of Kenmark Ventures LLC ("KENMARK") funds went  
5 directly to bank accounts belonging to Electronic Plastics, LLC (the "COMPANY"). Mr.  
6 Graham commented that our settlement conference was very thorough and even stated my  
7 client had over a 75% chance of winning if not higher.

8 5. I personally reviewed the evidence confirming that all KENMARK fund transfers went  
9 directly into the COMPANY and additionally each of the transfers either stated they were  
10 investments or did not specify the purpose of the transfer.

11 6. My review of the KENMARK fund transfers confirmed that none of the funds or transfers  
12 had gone to Mr. Thomas either directly or indirectly.

13 7. I also reviewed K-1's of the Company and the bankruptcy file for the COMPANY  
14 which listed KENMARK as a 12% investor of the COMPANY.

15 8. I reviewed the revisions of the LLC agreements related to the KENMARK investment in  
16 the COMPANY wherein KENMARK's counsel made comments or requested changes  
17 and all of the proposed revisions included a schedule identifying KENMARK as 12%  
18 owner of the COMPANY. No reference was ever made to changing the word  
19 "investment" to "loan."

20 9. Morrissey was reinstated prior to trial. In that I was brought into this case because of  
21 Morrissey's remaining fifty-five or sixty day suspension and was not sharing any of the  
22 fees we all agreed that I would withdraw and Morrissey alone would represent our clients.  
23 A judicial council substitution of attorney form substituting me out was prepared and  
24 signed and Morrissey assured me he would file the same the following Monday when he  
25 appeared for trial. (In 2013 I ascertained that Morrissey never filed this document)

26 10. Sometime during the first week of October of 2011 in a phone conversation with Morrissey  
27 and Mr. Thomas I was informed they had settled and were going to recite the settlement on the  
28 record later that afternoon. Morrissey in a very boisterous manner told me that the agreed upon

1 terms of the settlement to be recited on the record were not enforceable against Mr. Thomas or AT  
2 Emerald LLC and that neither would have to pay anything and that defendant Michael Gardner,  
3 the CEO of Electronic Plastics LLC, had agreed to take full responsibility to pay the same and that  
4 Mr. Thomas as an investor in said LLC would not have to pay nor could they force him to pay.

5 11. I congratulated them both and did not inquire any further.

6 12. Over a year later in early January of 2013, Mr. Thomas contacted me and told me he  
7 received notice that he was required to make a payment of \$500,000.00 under the terms of the  
8 settlement.

9 13. When Mr. Thomas asked me how that was possible, I told him once again I did not recall  
10 what the terms of the settlement were because I was not present at the hearing and never saw a  
11 copy of the written settlement.

12 14. Mr. Thomas asked me whether I recalled the conversation he, Morrissey and I had right  
13 before the settlement hearing when Morrissey told me it was not enforceable against him. I told  
14 Mr. Thomas I did but as you know I wasn't present at the settlement nor had I ever seen the  
15 settlement document. I further told him I did not want to be involved in a possible malpractice  
16 action against Morrissey. Thomas was in Los Angeles with his attorney Steve Smith preparing for  
17 the Bahia Emerald case at the time of this conversation. Sometime later that week and I don't  
18 recall if it was his office or KENMARK's attorneys that subsequently supplied me with a copy of  
19 the settlement, but I do know this was the first time I saw the same. After reading the agreement I  
20 could not figure out how it was not enforceable against our clients. Although I had not been able to  
21 communicate with Mr. Morrissey in over a month, I again left several messages for him to explain  
22 to me how he determined it to be unenforceable against our clients. Needless to say my efforts  
23 were in vain. Mr. Thomas needed to prevent this settlement to become a judgment containing  
24 admissions of fraud which could be used against him in his up incoming Bahia Emerald trial so he  
25 thereafter with the assistance of new counsel obtained more time to make this first payment  
26 thereby preventing the same. Not only could I not find any language in this settlement agreement  
27 which would lead any attorney to reasonably conclude that our clients would not be responsible for  
28 any payment, I was shocked to see that it contained language that would allow a judgment to be

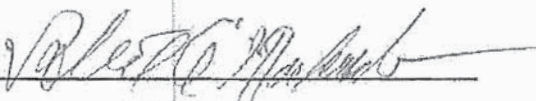
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1 entered against him pursuant to two causes of actions which were premised on fraudulent conduct.  
2 Especially in that they were only referred to as the fourth and fifth causes of actions with no  
3 mention of fraud or wrongful conduct. This coupled with the recital on the record that no party is  
4 admitting to any wrong doing, together with Mr. Morrissey being so emphatic when telling our  
5 client to trust him that he would not have to pay and especially in light of Mr. Thomas being  
6 severely dyslexic and thus having to trust in our duty to advise him truthfully about his case and  
7 how a settlement might affect him, I have to conclude that Morrissey's conduct constituted  
8 extrinsic fraud and client abandonment and thus Mr. Thomas had no counsel.

9 15. Mr. Thomas could not have obtained assistance from me in bringing Mr. Morrissey's fraud  
10 against him to light before now because, I was under a criminal investigation and eventually  
11 charged for aiding Morrissey in the unlicensed practice of law and my defense counsel had  
12 instructed me not to have contact with any former client where there had been involvement by Mr.  
13 Morrissey. The criminal matter just recently came to conclusion and therefore I am now able to  
14 make this declaration. I regret to say that at the time they informed me of the contemplated  
15 settlement I relied entirely upon the statements made by Morrissey to the very unfortunate  
16 detriment of Mr. Thomas. When Mr. Thomas told me the horrendous financial and emotional  
17 impact he and his family incurred because of Morrissey's deception, I felt remorse at not having  
18 come forward earlier and feel it necessary to do the right thing for Mr. Thomas and no longer be  
19 shielded by advice of counsel.

20 I declare under of penalty of perjury that the foregoing is true and correct and that if called  
21 as a witness I could, and would, competently testify thereto based on my own personal knowledge  
22 and belief.

23 Executed this 12th day of February, 2018 at San Jose, California.

24  
25   
26 Robert A. Machado